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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 320

LINCOLN ELECTRIC COMPANY,

Appellant,

vs.

JAMES V. FORRESTAL,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

This is a suit to enjoin enforcement of the initial Renegotiation Act applicable to the year 1942 on the ground the statute is unconstitutional.

The three-judge District Court, convened pursuant to the Act of August 24, 1937, 50 Stat. 752, Section 3, 28 U. S. C. 380a, overruled appellee's motion for summary judgment. 56 F. Supp. 308. Upon subsequent submission of the case on the merits and upon motions by both parties for judgment, the court granted appellee's motion and dismissed

the complaint. The dismissal came on the ground appellant had not filed petition in the Tax Court, a remedy which, because it was provided by a subsequently enacted statute, was not available when this suit was filed, and which, when it did become available, appellant could not pursue save at the peril of loss of substantial rights.

I. Jurisdiction

This Court has jurisdiction to review upon appeal under the Act of August 24, 1937, 50 Stat. 752, Section 3, 28 U. S. C. 380a. The statute provides that in a case such as this, seeking an injunction restraining enforcement of an act of Congress upon the ground that such act or any part thereof is repugnant to the Constitution:

> "An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case."

II. Statute Involved

The statute, the validity of which is here involved, is the initial Renegotiation Act and the amendments thereto applicable to the year 1942, namely:

1. The original Act of April 28, 1942, Section 403(c), Sixth Supplemental National Defense Appropriation Act, Public Law 528, 77th Congress, 56 Stat. 226, 245.

2. The amendment of October 21, 1942, Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

3. The amendment of July 1, 1943, Section 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347, 348.

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The subsequent law, enacted by the Revenue Act of 1943 which became effective February 25, 1944 (Public Law 235, 78th Congress, 58 Stat. 21, 78), when the statute was substantially rewritten, is not here involved except only for the provision then made for suit in the Tax Court. As to this provision, considerations quite different from those discussed in *Aircraft & Diesel Equipment Corporation* v. *Hirsch*, decided June 16, 1947, which dealt with the year 1943, apply because (1) this case relates solely to the year 1942, and (2) as will be pointed out, questions not open in *Aircraft* arise on the present record.

The statute and all the amendments are set forth in full in the appendix. The pertinent provisions thereof are as follows:

The Original Act

The original Act of April 28, 1942, applied only to contracts and subcontracts of the War and Navy Departments and the Maritime Commission. In the case of all such contracts it committed to the secretary of each such department, or his delegate, the power of "refixing • • • the contract price." It said:[1]

> "The Secretary of each Department is authorized and directed, *whenever in his opinion excessive profits have been realized*,[2] or are likely to be realized, from any contract with such Department or from any subcontract, thereunder,
>
> (1) to require the contractor or subcontractor to renegotiate the contract price,
>
> (2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a

[1] Section 403(c), Sixth Supplemental National Defense Appropriation Act, Public Law 528, 77th Congress, 56 Stat. 226, 245.

[2] Emphasis supplied throughout.

result of such renegotiation to represent excessive profits, and

(3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor."

This power was to extend to, Sec. 403(c):

"any contract [that is, "any contract for an amount in excess of $100,000"] [3] with such Department [i.e., the War Department, the Navy Department, or the Maritime Commission] or * * * any subcontract thereunder,"

and it was expressly declared to be, Sec. 403(c):

"applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause,[4] provided that final payment pursuant to such contract or subcontract has not been made prior to [April 28, 1942] the date of enactment of this Act."

This power to rewrite not only contracts of the Government but private contracts between third persons—many of them, as here, entered into before the statute was passed and without knowledge that the transaction was even remotely connected with the production of materials for ultimate use in a Government contract—was to be exercised by the secretary, or by anyone to whom he or his appointee in turn might delegate that power. The secretary (that is,

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[3] It was not until the amendment of October 21, 1942 that the statute authorized renegotiation when "the *aggregate sales* * * * under contracts with the Departments and subcontracts thereunder" exceed $100,000.

[4] None of the contracts here in question contained such clause (R. Vol. I, p. 7, Paragraph 26).

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the Secretary of War, the Secretary of the Navy, or the Chairman of the Maritime Commission) the statute declared, may delegate that power, Sec. 403(f):

> "in whole or in part, • • • to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

The Subsequent Amendments

The statute was amended October 21, 1942.[5] The shape and purpose of the act remained the same. The changes then made, so far as is here material, were:

1. The Treasury Department was added to the renegotiating agencies.

2. A definition of "excessive profits" was supplied. This, however, added nothing to the act. It merely said, in peculiar statutory double-talk, " 'excessive profits' means • • • excessive profits." This is the definition, Sec. 403(a)(4):

> " 'excessive profits' means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits."

3. The statute as originally passed, mentioned but did not define subcontracts. By the amending act a definition was supplied. It said, Sec. 403(a)(5):

> "The term 'subcontract' means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property."

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[5] Sec. 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

4. The statute authorized the secretary, "When the contractor or subcontractor holds two or more contracts or subcontracts," to, Sec. 403(c)(1):

> "renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract."

5. The original act authorized the secretary to enforce his determination by the withholding of government funds or by suit. The amending act authorized in addition the enforcement thereof, Sec. 403(c)(2):

> "(i) by reductions in the contract price of the contract or subcontract, or by other revision in its terms
> • • •
>
> (iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract • • •"

or by any combination of the several methods.

The statute was amended a second time on July 1, 1943.[6] The only change then made was to add to the Renegotiation Act contracts and subcontracts of:

> Defense Plant Corporation,
> Metals Reserve Company,
> Defense Supplies Corporation,
> Rubber Reserve Company.

This change was not expressly declared to be retroactive. Appellee, however, in the order here in question has so interpreted it, and has required renegotiation of business done in the year 1942 with Defense Plant Corporation.

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[6] Sec. 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347, 348.

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The third amendment came on July 14, 1943.[7] It merely added to the contracts subject to renegotiation the so-called war brokers' contracts

> "under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder * * *."

This amendment is not here involved for appellant had no such contracts.

The fourth amendment was that made by the Revenue Act of 1943,[8] which became effective February 25, 1944, nearly four months after this suit was filed and more than one month after this suit was at issue by the filing of answer. The substantive provisions of the statute then were entirely rewritten but—except as they emphasize the constitutional frailties of the original act—are not here material. Aside from the provision for suit in the Tax Court presently to be mentioned, the amended statute was not made applicable to the year 1942 except for certain sections (dealing for the most part with contracts declared to be exempt from renegotiation) which have no application to this case. Other sections, laying down standards for administrative conduct, providing for a hearing, and requiring findings to be made, are likewise inapplicable here because they were expressly declared to be applicable only to fiscal years ending after June 30, 1943.

The only portions of the new act which have any bearing on the present case are the provisions authorizing suit in the Tax Court. The statute as then amended specified that with respect to orders dealing with fiscal years ending after

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[7] Public Law 149, 78th Congress, 57 Stat. 564.

[8] Public Law 235, 78th Congress, 58 Stat. 21, 78.

June 30, 1943 issued by the War Contracts Price Adjustment Board, Section 403(c)(1):

> "*In the absence* of the filing of a petition with The Tax Court of the United States * * * *such order shall be final* and conclusive and shall not be subject to review or redetermination by any court or other agency."

However, when it came to deal with orders theretofore issued by a secretary, as in this case, prior to the date of the enactment of the Revenue Act of 1943 (that is, prior to February 25, 1944) with respect to fiscal years ending before July 1, 1943, as in this case, the Congress did not, as it did in Section 403(c)(1) above quoted, say that "In the absence of the filing of a petition * * * such order shall be final," but said instead, in terms which would be appropriate if it were granting an additional optional remedy, that one aggrieved by such order (which would include the present appellant) Section 403(e)(2):

> "*may* within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943 [i.e., February 24, 1944], file a petition with The Tax Court * * *."

The statute purported, however, to condition the grant of the right to persons, circumstanced as was this appellant, to so file by the further proviso that upon such filing the Tax Court's decision would be final and not subject to review. Thus, the statute provided, Section 403(e)(2), that:

> "*Upon such filing* such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as

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of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply."

The "paragraph (1)" referred to is Section 403(e)(1), which says:

"Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reveiwed or redetermined by any court or agency."

III. Dates of Judgment and Appeal

The date of the judgment sought to be reviewed is August 5, 1947. The application for appeal was presented August 12, 1947.

IV. Nature of Case

Appellant is engaged in the manufacture and sale of electric arc welding machines, electrodes and supplies.[9] These articles it manufactured, not pursuant to the specifications of a particular buyer, but for stock from which it then sold, generally by purchase order, to the trade as called upon. Of the company's total sales in 1942 of $33,500,000, but 7.6% was to the United States and its agencies. The balance was to the trade generally, not earmarked for use upon any specific government contracts. Most of these orders—which came in at the rate of 10,000 a month—were in small amounts.[10]

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[9] In the year in question, welding machines accounted for 41% of appellant's sales, electrodes for 53%, and supplies 6% (R. Vol. I, p. 2, Paragraph 4).

[10] For example, on November 13, 1943, shortly after this suit was filed, when the case was to come on for hearing upon appellant's application for a temporary restraining order, of appellant's $3,700,000 of accounts receivable 78.63% was represented by accounts in sums less than $500 (R. Vol. I, p. 101). These sums were owed by customers located in 47 states and other parts of the world (R. Vol. I, pp. 91-3).

In proceedings brought pursuant to the statute, appellee determined that $21,480,000 of the company's business from April 28, 1942, the date of the enactment of the statute, to the end of the year, including contracts theretofore performed but unpaid on April 28, 1942, was subject to renegotiation. Upon the authority of the statute appellee, on October 23, 1943, determined [11] that $3,250,000 of the profits realized by the company in 1942, plus additional sums in the contingencies named in the order, were excessive and declared that:

> "Unless action is taken by you not later than November 5, 1943, to eliminate such excessive profits in a manner satisfactory to me, appropriate action in this respect will be taken by me without further notice to you, by directing the withholding of amounts otherwise due to you, as a contractor or subcontractor, by the Government and by prime contractors with the Government."

The administrative process then was complete. There was no place, save only the equity court, to which appellant could resort to protect itself from the threatened general levy upon its thousands of customers, which was, as appellant believed, unlawful and in defiance of the Constitution. The statute provided no remedy in the Tax Court—that did not come until more than four months later. The company, therefore, filed this suit. It filed it on November 3, 1943, in the District Court for the District of Columbia.

1. Case and Rulings Are Such as to Support Jurisdiction Here

The statute, Act of August 24, 1937, 50 Stat. 752, Section 3, 28 U. S. C. 380a, under which this suit was brought, lodges jurisdiction in this Court to review upon appeal where

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[11] The order is set forth in the appendix.

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"interlocutory or permanent injunction * * * restraining the enforcement * * * of * * * any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States" is granted or denied.

Appellant sought such injunction. It was denied.

Faced with the threat that money "otherwise due" it, not only from the Government but from the company's customers, would be seized, and under command of the statute "be covered into the Treasury as miscellaneous receipts,"[12] appellant challenged appellee's authority to do so. It prayed an injunction on the ground the Renegotiation Act, which appellee tendered as the warrant of his authority, for the reasons set forth in the complaint (Paragraphs 19-33) was invalid under:

1. Article I, Section 1 and Article I, Section 8, Paragraph 18 of the Constitution, in that it unlawfully delegates legislative power by committing to the unrestrained and unguided "opinion" of the secretary the decision whether and how much of a citizen's property is to be taken.

2. Amendment V to the Constitution in that it deprives appellant of its property without due process of law because the statute:

(a) is so vague and uncertain no one can know what it means;

(b) permits the taking upon disclosed and secret evidence and without hearing and findings;

(c) retroactively impairs private contracts and repudiates valid obligations of the United States.

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[12] This disposition is directed by Section 403(c) of the Act of April 28, 1942, and by Section 403(c)(2) of the amendment of October 21, 1942.

3. Amendment V to the Constitution in that it takes appellant's property for public use without just compensation.

4. Amendment X to the Constitution in that it exercises powers not delegated to the United States.

Upon motions for temporary restraining order and for an interlocutory injunction pending final hearing, it was agreed that the order would not be enforced (R. Vol. I, p. 15, Paragraph 41) "until a conclusive decision is reached in the pending litigation." Accordingly, the motions for a temporary restraining order and for interlocutory injunction were not pressed to hearing [13] and the order, of course, has not been enforced.

Appellee then filed answer and after the amendment of the statute on February 25, 1944, permitting suit in the Tax Court, appellee moved for summary judgment. The court, after hearing arguments, overruled the motion. 56 F. Supp. 308. The court said (p. 310):

> "Nor do we think plaintiff has elsewhere and otherwise an adequate remedy. The right to go to the Tax Court did not accrue until long after this suit was instituted, and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought. *Dawson v. Kentucky Distilleries & W. Co.*, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638. Nor is the right to sue the United States in the Court of Claims in the circumstances of this case an adequate remedy; for there is no such right there as to plaintiff's thousands of customers who

[13] In the case of a suit such as this, under 28 U. S. C. 380a, unlike 28 U. S. C. 380, which the Court discussed in *Ayrshire Collieries Corporation v. United States*, 91 L. Ed. Adv. Op. 1006, decided April 28, 1947, it is not essential to jurisdiction that an interlocutory order be sought or pressed to hearing.

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necessarily would have to be sued separately where they reside.

Plaintiff brought this suit in the only court having jurisdiction of the persons of the defendants. • • •

Defendants insist that, notwithstanding this and granting also that the Act of Congress is unconstitutional, plaintiff has no other recourse than to challenge the claimed right of the Government in the Tax Court or in the Court of Claims.

We think this is not sufficient."

The court thereupon set the case for hearing. The record was stipulated and, both parties having moved for judgment, the court, on October 16, 1946 (R. Vol. I, insert p. 19):

> "Ordered, that this cause be heard upon all questions properly before the Court upon briefs and oral argument • • •."

The court heard arguments on January 13, 1947, and, on July 14, 1947, announced its opinion granting appellee's motion and dismissing the complaint. Judgment was entered thereon on August 5, 1947. In the court's view the case was controlled by *Aircraft & Diesel Equipment Corporation* v. *Hirsch* and *Wade* v. *Stimson*, decided June 16, 1947, and it accordingly dismissed on the ground:

> "The plaintiff had its opportunity to pursue its administrative remedy and failed to take advantage of it."

As later will be pointed out, *Aircraft* and *Wade* do not justify the dismissal.

2. Cases Sustaining Jurisdiction to Review Upon Appeal

Cases sustaining the jurisdiction of this Court to review upon appeal are:

Tennessee Electric Power Co. v. *Tennessee Valley Authority* (1939), 306 U. S. 118;

Wickard v. *Filburn* (1942), 317 U. S. 111;
Oklahoma v. *Guy F. Atkinson Co.* (1941), 313 U. S. 508;
Mulford v. *Smith* (1939), 307 U. S. 38;
Coffman v. *Breeze Corporations, Inc.* (1945), 323 U. S. 316;
Mine Safety Appliances Company v. *Forrestal* (1945), 326 U. S. 371;
Aircraft & Diesel Equipment Corporation v. *Hirsch* (1947), — U. S. —, June 16, 1947.

3. Questions Involved Are Substantial

The constitutional questions arising upon this record are substantial. And, as will be pointed out, the right to decision thereof is not affected by the *Aircraft* and *Wade* cases.

Constitutional Questions

1. The statute, Section 403(c)(1), commits to the "opinion" of the secretary, without standard, rule or guide of any kind,[14] decision as to whether, and how much of, a citizen's property is to be taken. The secretary is directed to do, or not do, whatever he may think fit, or, Section 403(f), to pass that power to his delegate to be by him exercised however the delegate's "opinion" may dictate. The delegate in turn may pass that power to another—and that other may yield it to yet another—to be by him exercised as he in turn in his "opinion" may see fit.[15] Thus, the citizen is parted from his property, not because the Congress has so required, but because it is the "opinion" of some third

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[14] The standards written into the 1944 act are expressly made inapplicable to fiscal years ending before July 1, 1943. They, therefore, do not apply to this case.

[15] Here the power was delegated by Secretary of the Navy Knox to appellee, under Secretary Forrestal, and by him delegated to the Navy Price Adjustment Board. Proceedings were conducted by that Board but the order then was entered by appellee Forrestal.

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person, or of some delegate or subdelegate of such third person, that he should so be parted from his property. The statute is, therefore, invalid as an unlawful delegation of legislative power and is condemned by:

Panama Refining Co. v. *Ryan* (1935), 293 U. S. 388;
A. L. A. Schechter Poultry Corp. v. *United States* (1935), 295 U. S. 495;
Carter v. *Carter Coal Co.* (1936), 298 U. S. 238;
Bowles v. *Willingham* (1944), 321 U. S. 503;
Yakus v. *United States* (1944), 321 U. S. 414.

2. The statute is so vague and uncertain no one can know what it means. *Yu Cong Eng.* v. *Trinidad* (1926), 271 U. S. 500, 518; *Connally* v. *General Construction Company* (1926), 269 U. S. 385, 391. It is one thing to specify for the future what may be collected, and quite another, after the fact, as here, to say that a price, solemnly agreed to by contract, and which has been paid, is "excessive" because an administrative officer in his uncontrolled discretion says it is. To the one the citizen may be able to conform; to the other, lacking a power of prophecy, he cannot. The statute is, therefore, invalid:

United States v. *Rock Royal Co-operative, Inc.* (1939), 307 U. S. 533, 574;
Opp Cotton Mills, Inc. v. *Administrator* (1941), 312 U. S. 126, 144;
United States v. *L. Cohen Grocery Company* (1921), 255 U. S. 81, 89.

The vagueness of the statute is not made unimportant because it deals solely with a civil liability. The rule, although emphasized in criminal cases, applies to civil liabilities as well:

A. B. Small Company v. *American Sugar Refining Company* (1925), 267 U. S. 233, 239;
Cline v. *Frink Dairy Company* (1927) 274 U. S. 445, 463.

3. The statute permits, because it commits all power to the secretary's unbridled "opinion" the taking, as here, upon secret evidence,[16] without hearing and without findings. This is condemned by:

Southern Railway Co. v. *Virginia* (1933), 290 U. S. 190, 192, 195;

Interstate Commerce Commission v. *Louisville and Nashville Railroad Company* (1913), 227 U. S. 88, 91;

Ohio Bell Telephone Co. v. *Public Utilities Commission* (1937), 301 U. S. 292, 300-5.

4. The statute in terms applies, Section 403(c), not only to contracts thereafter made but also to contracts entered into prior to the enactment of the statute in all cases where "final payment * * * has not been made * * *." Under it appellant was renegotiated upon upwards of $21,000,000 of contracts. Of this amount 27% was upon contracts which were in effect before the statute was enacted, and better than 10% was upon contracts which had been fully performed save only that payment had not yet been made when the statute was passed (R. Vol. I, p. 9, Paragraph 29). Some of the contracts were with government agencies and some with private individuals. Such repudiation by the Government of its own contracts is condemned by:

Lynch v. *United States* (1934), 292 U. S. 571, 579-80;

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[16] The order recites, and the answer (Paragraph 24) admits, that the determination here in question is based in part upon undisclosed data obtained by appellee "from governmental or other reliable [but unnamed] sources * * *." Although such use of secret evidence was challenged (R. Vol. I, p. 13, Paragraph 35) none of it was revealed to appellant until more than two years later, on May 16, 1946, when, in connection with the preparation of the record in this case, the Board's minutes were disclosed to appellant's counsel. It then appeared that among the matters considered by the Board were secret reports that this particular citizen had been "non-cooperative" toward the Government (R. Vol. III, Exhibit 55, p. 136, Paragraph 15).

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Perry v. *United States* (1935), 294 U. S. 330, 350-1;
United States v. *Bethlehem Steel Corporation* (1942), 315 U. S. 289, 308;
United States v. *Standard Rice Company, Inc.* (1944) 323 U. S. 106, 111,

and retroactive impairment of private contracts is condemned by:

Calder v. *Bull* (1897), 3 Dallas 386, 388;
Continental Illinois National Bank & Trust Co. v. *Chicago, Rock Island & Pacific Railway Co.* (1935), 294 U. S. 648, 680;
Louisville Joint Stock Land Bank v. *Radford* (1935), 295 U. S. 555, 602.

5. The statute, because it authorizes seizure of funds otherwise payable to appellant by its customers, takes its property for public use without just compensation, and is condemned by:

Brooks-Scanlon Corporation v. *United States* (1924), 265 U. S. 106;
Lynch v. *United States* (1934), 292 U. S. 571, 579;
Louisville Joint Stock Land Bank v. *Radford* (1935), 295 U. S. 555, 602.

Other Questions

Aside from the constitutional questions on which jurisdiction was founded, appellant claimed also the right to injunction on the ground that the order was in excess of any conceivable authority given to appellee under any reading of the statute, even assuming the statute to be valid, in that:

1. The statute authorized only a bargaining and did not authorize the making of a unilateral order requiring repayment without agreement thereto by appellant.

2. Appellee wrongfully subjected to renegotiation, and ordered repayment on account of:

(a) Subcontracts which were not subcontracts within the meaning of (i) the original act of April 28, 1942, or (ii) the act as amended October 21, 1942.

(b) Contracts entered into with Defense Plant Corporation in 1942, although the statute, when amended on July 1, 1943 to embrace Defense Plant Corporation contracts, did not purport to apply to contracts entered into prior to the date of the amendment.

(c) Contracts in sums less than $100,000, entered into prior to October 21, 1942, which were not made subject to renegotiation by the statute.

3. Appellant, under any reading of the statute, had realized no excessive profits whatever.

The court, having jurisdiction because of the presence of the constitutional questions, had, of course, jurisdiction also to decide these questions, or so many of them as it might be necessary to decide in order to arrive at judgment. It was so held in:

Sterling v. *Constantin* (1932), 287 U. S. 378, 393-4;

Railroad Commission of California v. *Pacific Gas & Electric Co.* (1938), 302 U. S. 388, 391;

Davis v. *Wallace* (1922), 257 U. S. 478, 482;

Louisville and Nashville Railroad Company v. *Garrett* (1913), 231 U. S. 298, 303-4;

United Fuel Gas Company v. *Railroad Commission of Kentucky* (1929), 278 U. S. 300, 307;

Mosher v. *City of Phoenix* (1932), 287 U. S. 29, 30;

Siler v. *Louisville and Nashville Railroad Company* (1909), 213 U. S. 175, 191;

Hillsborough v. *Cromwell* (1946), 326 U. S. 620, 629;

Porter v. *Warner Holding Company* (1946), 328 U. S. 395, 399.

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Aircraft and Wade Cases

The appeal is not made any the less substantial by the *Aircraft* and *Wade* cases. The Court, to be sure, there dismissed, but it did so upon considerations which have no application here.

In *Aircraft*, and in *Wade*, which was decided in a *per curiam* opinion on the authority of *Aircraft*, it must be remembered, the complainant had in fact filed petition in the Tax Court, and in both cases petitions were there pending when the cases came to this Court. This difference alone has far-reaching, and, from the standpoint of the Constitution, controlling consequences. Where, as in *Aircraft* and *Wade*, the complainant has accepted the administrative remedy tendered, there is no denial of a constitutional right in requiring him to exhaust that administrative process before calling upon the courts for relief. Perchance there will be no need for relief when the administrative process is completed. It is quite another matter, however, to deny a hearing to a litigant where, as here, (1) the administrative process was complete at the time the suit was brought, the Tax Court remedy not being made available until long after the suit was filed, and equally or more important, (2) the litigant could not, save at the peril of loss of constitutional rights, pursue the subsequently created administrative remedy. Such is the case here. This Court has never given countenance to the doctrine—which once adopted would bring constitutional limitations to an end [17]—that an administrative process, even where it is, unlike the case here, available when suit is brought, must be pursued

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[17] "That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system * * *." *Crowell* v. *Benson* (1932), 285 U. S. 22, 57; "That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded." *St. Joseph Stock Yards Co.* v. *United States* (1936), 298 U. S. 38, 52.

where that can be done only at the hazard of substantial rights. To the contrary this Court has recognized that there are situations where resort may be had to the courts without pursuing the administrative remedy. Recent examples are:

Steele v. *Louisville & Nashville Railroad Co.* (1944), 323 U. S. 192, 205-7;

Tunstall v. *Brotherhood of Locomotive Firemen & Enginemen* (1944), 323 U. S. 210, 213-4.

The Court expressly recognized this principle in *Aircraft*, for it pointed out that administrative remedies must be pursued (p. 17):[18]

> "where following them could result *in no greater loss* than * * * delay and inconvenience * * *."

As the Court there said (p. 19):

> "the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held *sufficient to dispense with exhausting the administrative process* before instituting judicial intervention."[19]

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[18] All references to the *Aircraft* opinion are to the pages of the preliminary print of the opinion.

[19] Indeed, so far satisfied was appellee that the court below did have jurisdiction, even though appellant had not filed petition in the Tax Court, that, by opening brief upon the argument below, appellee assured the court (defendant's brief, p. 76, Note 32) "the Government does not raise the question of this Court's jurisdiction to decide that [i. e. the constitutional] issue in the present proceedings." Appellee said further (p. 21 of defendant's opening brief, Paragraph 6) "Of the questions sought to be raised by plaintiff, therefore, the only one which the Court may have power to decide is whether the Act on its face is totally invalid." It was explained (defendant's opening brief, p. 22) "The limitation of the District Court's jurisdiction to a determination of the constitutional validity of the statute is by no means novel," and argued that (defendant's opening brief, p. 23, Paragraph 7) "even though the Court has statutory jurisdiction to determine the constitutional validity of the Act on its face, the

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Here, let it be recalled—unlike the situation in the other renegotiation cases this Court has had—when the suit was filed there was no other place to which appellant could go. Thereafter the administrative remedy in the Tax Court was made available. What should appellant have done? Its case was already at issue in the District Court. To dismiss and begin anew in the Tax Court offered it the possibility of presenting its argument that none of its profit was excessive. For example, appellant passed on to its customers, including the United States, the results of economies—brought about by an efficiency which appellee does not gainsay (see answer, Paragraph 29)—to the point where, percentagewise, and even on a dollar basis, appellant realized less than in prewar years [20] (R. Vol. I, p. 6, Paragraph 21; p. 8, Paragraph 27; Exhibit 11, p. 41; Exhibits 39-40, pp. 103-5). This challenge appellant could make by petition to the Tax Court, but it could do so only at the risk of forfeiting its right to challenge the statute on constitutional grounds.

This is so for two reasons.

The *first* is that a litigant ordinarily cannot accept the benefits of a statute and then attack it. That the peril which faced appellant was real is demonstrated by *Cappellini* v. *Commissioner* (1929), 14 B. T. A. 1269. Deficiency was

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Court should decline to exercise its jurisdiction in this case." This is not to say a litigant may admit this Court into jurisdiction. It is merely to point out that the questions raised by this suit are of a substance sufficient to win from counsel an admission that, notwithstanding appellant's failure to resort to the Tax Court, the court below had jurisdiction "in the present proceedings" to pass upon the constitutional question.

[20] In the nine years prior to 1942 appellant's average return before taxes exceeded its return—without renegotiation—in 1942. That average was 28.84%; in 1942 without renegotiation it was 26.88% (R. Vol. I, p. 6, Paragraph 21). After taxes, despite the tremendously increased business, the return was far less (R. Vol. I, p. 6, Paragraph 21). The order would cut this to less than one-half, or, after taxes, to 2.33% (R. Vol. I, p. 8, Paragraph 27).

assessed against Cappellini. He thought the statute under which it was imposed was unconstitutional. He, as permitted, took his complaint to the Tax Court—then the Board of Tax Appeals. The Board "in the view we take of the matter" found itself helpless to pass upon the constitutional questions presented. When it was argued that if the statute violates constitutional rights it was the Board's clear "duty to declare in favor of the Supreme Law, the Constitution," the Board said (p. 1276):

> "It is a sufficient answer that constitutional rights may be waived (*Pierce v. Somerset Railway*, 171 U. S. 641, 648; *Kearney v. Case*, 12 Wall. 275, 281; *Bank of Columbia v. Olney*, 4 Wheat. 235), and if any constitutional rights of petitioners are violated by section 280 they have waived them by initiating the proceeding permitted by that section."

Hirsh v. *Block* (App. D. C., 1920), 267 Fed. 614, 618, reversed on other grounds, (1921), 256 U. S. 135, teaches the same lesson and so do *Wall* v. *Parrot Silver & Copper Company* (1917), 244 U. S. 407, 411-2, and *United Fuel Gas Company* v. *Railroad Commission* (1929), 278 U. S. 300, where this Court said (p. 308):

> "we think that appellants who have procured action by a state commission under a state statute may not assail that action * * *."

On the last decision day the Court emphasized the point in *Fahey* v. *Mallonee*, decided June 23 ,1947, saying:

> "It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'"

Second. A litigant choosing to bring suit ordinarily must be held to have accepted the remedy tendered with the conditions imposed.

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While the Congress, significantly, as appellant thought, refused to say, in the case of persons circumstanced as appellant, that, Section 403(c)(1), "In the absence of the filing of a petition with The Tax Court * * * such order shall be final," but instead said that such persons, Section 403(e)(2):

> "*may* * * * file a petition,"

it attached to such filing the proviso that "Upon such filing" the Tax Court's jurisdiction shall be, Section 403(e)(1), "exclusive." Here it is unknown, even now, how far a litigant may be foreclosed by such administrative determination. Said the Court in *Aircraft* (p. 17), "we explicitly reserve decision, upon the question of the finality of Tax Court decisions in these matters."

The peril that faced appellant, therefore, was that, by filing its petition in the Tax Court, it would be held to have waived its right to challenge the statute on constitutional grounds, or at least have committed final decision thereof to an administrative tribunal.

There is, of course, as the Court pointed out in *Yakus* v. *United States* (1944), 321 U. S. 414, 444, "no constitutional requirement that that test [of validity] be made in one tribunal rather than in another," but this is true only (p. 444):

> "so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process * * *."

This danger of loss of rights is alone warrant enough for jurisdiction here. Where the peril is real, resort to another remedy will not be required. This is the teaching of:

Ex parte Young (1908), 209 U. S. 123, 144-9;
Willcox v. *Consolidated Gas Company* (1909), 212 U. S. 19, 53-4;

Missouri Pacific Railway Company v. *Tucker* (1913), 230 U. S. 340;
Oklahoma Operating Company v. *Love* (1920), 252 U. S. 331;
Chicago, Burlington & Quincy Railroad Company v. *Osborne* (1924), 265 U. S. 14,

where the Court held that resort to other proceedings would not be compelled where the relief so tendered could be had only at great hazard. As the Court said in *Ex parte Young* (1908), 209 U. S. 123, 147:

> "to provide a different remedy to enforce a contract, which * * * imposes conditions not existing when the contract was made, was to offer no remedy, and when the remedy is so onerous and impracticable as to substantially give none at all the law is invalid, although what is termed a remedy is in fact given."

In these cases, to be sure, the Court was concerned primarily with money penalties, but a deprivation of constitutional rights stands on no lesser plane.

Uncertainty alone on this point—and especially when looked at as matters stood when the Tax Court remedy first became available—is enough to support appellant's claim to the protection of an equity court. So this Court has held: "the existence of such a remedy is debatable and uncertain," *Union Pacific Railroad Company* v. *Board of County Commissioners* (1918), 247 U. S. 282, 287; "The District Court had jurisdiction * * * *because* of the uncertainty * * *," *Spector Motor Service, Inc.* v. *McLaughlin* (1944), 323 U. S. 101, 105; "there is such uncertainty concerning the * * * remedy as to make it speculative * * *," *Hillsborough* v. *Cromwell* (1946), 326 U. S. 620, 625; "the remedy * * * is an uncertain one. Should it be found unavailable * * * he would be left entirely without remedy * * *," *Gibson* v. *United States* (1946), 329 U. S. 338, 360.

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None of these considerations, of course, could be pertinent either in *Aircraft* or in *Wade*. In both appellant had in fact filed in the Tax Court and petitions there were yet pending when the cases came here. Whatever consequences might flow therefrom *had already attached* and there was nothing the Court could do to relieve that choice. It will be time enough after that remedy, so chosen, has been carried through to a conclusion, to determine what, if anything, the Court can do about it. Manifestly, however, it is quite a different matter to *force* a litigant into that position at the hazard of his constitutional rights.

This case differs from *Aircraft* and *Wade* in other controlling respects:

1. When this suit was brought the Tax Court remedy was not available. Whatever may be the situation of a litigant having choice of a further remedy, the rule ordinarily is that jurisdiction, once having attached, as it did here, is not lost if a different remedy is subsequently made available, or an existing remedy is made certain. As the Court said in *Dawson* v. *Kentucky Distilleries & Warehouse Company* (1921), 255 U. S. 288, 296, "Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available," and again, in *American Life Insurance Co.* v. *Stewart* (1937), 300 U. S. 203, 215, "the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." See also: *Busch* v. *Jones* (1902), 184 U. S. 598, 599-600, and *Corporation Commission of Oklahoma* v. *Cary* (1935), 296 U. S. 452, 459.

2. There are additional grounds here on which to base jurisdiction in equity which were absent in *Aircraft*. Unlike *Aircraft*, where at most the company (p. 25) "would be

forced to sue some sixteen 'or more' customers" or only "two or three" as defendants claimed, here appellant's customers numbered in the thousands and the amounts owed by them were small (R. Vol. I, pp. 91-3, 101). Moreover, in *Aircraft* the company was assured of the indemnity of the United States, to which the Court pointed. Such is not the case here. The indemnity provision is applicable only to fiscal years ending after June 30, 1943. Section 403(c)(2); Section 701(d) of the amendment of February 25, 1944. It has, therefore, no application in this case.

In short, and in summary—on the question of the right to bring the suit—it is plain that the basis for jurisdiction, absent in *Aircraft*, is here present. This is so for each and all of the following considerations:

1. The subsequently enacted provision for proceedings in the Tax Court, for the reasons already pointed out, itself creates such peril of loss of substantial constitutional rights as to establish an adequate basis for jurisdiction.

2. If the order be enforced—as, but for the intervention of this Court, it will be—appellant will be faced with the necessity of bringing a multiplicity of suits against its customers to recover sums withheld. *Ex parte Young* (1908), 209 U. S. 123, 160; *Union Pacific Railroad Company* v. *Board of County Commissioners* (1918), 247 U. S. 282, 285. These customers are numerous, scattered, and in the main owe but small amounts each (R. Vol. I, p. 6, Paragraph 23, p. 10, Paragraph 30; Exhibit 34, pp. 91-3; Exhibit 38, p. 101).

3. In any such suit, moreover, because decision in any one suit would not be binding in any other, appellant would be unable to get a determination of the issue of the extent to which, if the act be valid, its earnings were excessive. *Wilson* v. *Illinois Southern Railway Company* (1924), 263 U. S. 574, 576-7.

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4. The expense alone of such numerous suits would be prohibitive. *Allen* v. *Regents* (1938), 304 U. S. 439, 448.

5. Appellant would be exposed to the risk of the subsequent uncollectibility of judgments against its customers. *Mulford* v. *Smith* (1939), 307 U. S. 38, 46.

6. The interference with appellant's business would result in injury, irreparable and incapable of measurement. *Pierce* v. *Society of Sisters* (1925), 268 U. S. 510, 536; *Ashwander* v. *Tennessee Valley Authority* (1936), 297 U. S. 288, 322.

7. The threat, if exercised, would operate as an unlawful inducement to breaches of contract. *Hitchman Coal & Coke Company* v. *Mitchell* (1917), 245 U. S. 229; *Eagle Glass & Manufacturing Company* v. *Rowe* (1917), 245 U. S. 275.

8. The money, once covered into the Treasury, would be beyond reach of any suit. *United States* v. *Goltra* (1941), 312 U. S. 203, 208; *Mulford* v. *Smith* (1939), 307 U. S. 38, 46; *Raymond* v. *Chicago Union Traction Company* (1907), 207 U. S. 20, 40. Uncertainty alone on this point would be adequate to support jurisdiction. *Spector Motor Service, Inc.* v. *McLaughlin* (1944), 323 U. S. 101, 105; *Hillsborough* v. *Cromwell* (1946), 326 U. S. 620, 625; *Gibson* v. *United States* (1946), 329 U. S. 338, 360.

9. Even if the money, once seized, could be recovered, appellant could not in any forum recover interest thereon. *Hokpins* v. *Southern California Telephone Company* (1928), 275 U. S. 393, 399-400; *Educational Films Corporation* v. *Ward* (1931), 282 U. S. 379, 386, Note 2; *California* v. *Latimer* (1938), 305 U. S. 255, 261; *Graves* v. *Texas Company* (1936), 298 U. S. 393, 403. See also *Procter & Gamble Distributing Co.* v. *Sherman* (S. D., N. Y., 1924), 2 F. (2d) 165, where Judge Learned Hand observed (p. 166) "the relief is in-

adequate because of the express refusal to allow interest. [The same is true here.[21]] * * * it seems to me plain that it is not an adequate remedy, after taking away a man's money * * * merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all."

Other Cases Do Not Destroy Appeal

The appeal here, moreover, is not foreclosed by the other renegotiation cases which have been here:

Mine Safety Appliances Co. v. *Forrestal* (1945), 326 U. S. 371;
Macauley v. *Waterman Steamship Corporation* (1946), 327 U. S. 540.

Mine Safety did not deal with the problem arising upon this appeal. There it was stipulated that defendant would —as he did—withhold money in an amount sufficient to cover the company's liability. Thus, the suit was converted into one (p. 375) "designed to reach money which the gov-

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[21] Even the appropriation acts which made funds available to pay renegotiation determinations "erroneously collected" did not authorize payment of interest in any event but only at "not to exceed 4 per centum" and then only if "determined to be owing in law or equity." First Deficiency Appropriation Act of 1945, expiring June 30, 1946, 79th Congress, Public Law 40, approved April 25, 1945; Third Deficiency Appropriation Act of 1946, expiring June 30, 1947, 79th Congress, Public Law 521, approved July 23, 1946. Even in the current First Supplemental Appropriation Act, 80th Congress, Public Law 271, approved July 30, 1947, expiring June 30, 1948, there is no commitment to pay interest except "as may be determined by the War Contracts Price Adjustment Board" and then at "not to exceed 4 per centum." Since interest is not recoverable from the Government, 28 U. S. C. 284, "unless upon a contract expressly stipulating for the payment of interest," *United States* v. *Goltra* (1941), 312 U. S. 203; *United States* v. *Worley* (1930), 281 U. S. 339, 341, it is plain that none could be recovered by this appellant because "none of the contracts or purchase orders received by the company in 1942 contained an express provision for the payment of interest" (R. Vol. I, pp. 6-7, Paragraph 23).

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ernment owns," to which the Government obviously was a necessary party. It is not so here. There is no such stipulation. Nothing has been withheld. The order has not been enforced. But, if it should be enforced, so the order recites, it would be enforced by withholding sums "otherwise due" appellant—a seizure, in other words, of appellant's property—by directing contractors, appellant's customers, to withhold payments to appellant and to pay them instead into the Treasury.

Waterman, too, 327 U. S. 540, is quite different. In *Waterman* there was no challenge to the constitutional validity of the statute. *Waterman* accepted the statute but claimed only that the Board proposed to consider contracts which Waterman contended were not intended by the statute to be renegotiable. Where a litigant concedes the validity of a statute but claims only that there is danger it may be too broadly read, there is no reason why he should not pursue his administrative remedy. For that matter an order had not even been entered in that case and might never be. To be sure, in *Aircraft* the Court refused to put *Waterman* aside (p. 13) "for purposes of applying the exhaustion rule" even though (p. 2) "constitutionality was not involved." The absence of a constitutional question in *Waterman* obviously would not distinguish that case in a situation such as was presented in *Aircraft*, or require the Court to halt in mid-passage an administrative process already under way. But it does not follow, because Waterman, who raised no (p. 13) "issues of constitutionality," was told to go to the Tax Court, that the decision settles also this case where the question is whether constitutional rights are to be sacrificed in the process. The Court did not so intimate in *Waterman* nor in *Aircraft*. To the contrary, it recognized that there are situations where a different rule will apply.

Such is this case. That is what the holdings of this Court make plain. Witness, for example, *Smith* v. *Cahoon* (1931), 283 U. S. 553, where the Court said (p. 562):

> "the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate * * * one who is within the terms of the statute, but has failed to make the required application, is not at liberty to complain * * *. This principle, however, *is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right.*"

Euclid v. *Ambler Realty Company* (1926), 272 U. S. 365, declares the same principle. The Court said (p. 386):

> "A motion was made in the court below to dismiss the bill on the ground that, because * * * [appellee] had made no effort to * * * apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. * * * the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear."

That the Court, without saying so, intended to obliterate these landmarks, certainly is not to be assumed.

But even a narrower distinction will dispose of *Waterman*. He *could* have gone to the Tax Court. That remedy was available; it was *not* available here.

It is submitted that the questions here raised are substantial and are entitled to the consideration of this Court.

V. Opinions

The opinion of the court announced upon overruling appellee's motion for summary judgment, reported in 56 F. Supp. 308, and the court's opinion upon granting appellee's

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subsequent motion for judgment, not yet officially reported, are set forth in the appendix.

Respectfully submitted,

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August 12, 1947.

APPENDIX

Earlier Opinion of the Court Denying Appellee's Motion for Summary Judgment, 56 F. Supp. 308 (Filed August 2, 1944).

Civil Action No. 21866

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LINCOLN ELECTRIC COMPANY, *Plaintiff*,

v.

FRANK KNOX and JAMES V. FORRESTRAL, *Defendants*

Before Groner, Circuit Judge, and Bailey and Goldsborough, District Judges.

The case is now before us on a motion by defendants for summary judgment. The complaint of Lincoln Electric Company against Secretary Knox and Under-Secretary Forrestal was filed in this Court November 3, 1943. The main purpose was to obtain a decree that the Renegotiation Act, 50 U. S. C. A. Appendix, Section 1191, in its form prior to the amendments of February 25, 1944, is unconstitutional and unenforceable. Defendants answered January 20, 1944, denying unconstitutionality and setting up various other defenses. Subsequently the present motion was filed, in which the position of the defendants, shortly stated, is that the court lacks jurisdiction because the suit is in legal effect against the United States, which have not consented to be sued, and that the plaintiff has available to it adequate legal and administrative remedies.

Plaintiff is engaged in the manufacture and sale of electric equipment. The greater portion of its business is with customers scattered throughout the United States. The portion directly with the Departments of the United States is said to be less than 8% of the whole. The period here involved is the year ending December 31, 1942. Acting under the Renegotiation statute, defendants called on plaintiff for certain information in relation to its operations

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and sales for the year in question, and as a result of the examination of the data furnished, determined that plaintiff had realized 'excessive' profits of more than $3,000,000, and notified it that unless action were taken prior to November 5, 1943, in making proper restitution, defendants would direct the withholding of amounts due plaintiff by the Government and would likewise direct the withholding by plaintiff's customers of so much as might be due to plaintiff by them.

Defendants subsequently—that is to say, in January, 1944, long after the suit was filed—withdrew their threat to seize funds due plaintiff by its customers, and thereafter relied for restitution upon the seizure of sums due by the United States. But as to this plaintiff says that its rights to relief accrued as of the facts existing when the suit was brought and that the subsequent modification of the threat will not avail, since defendants may again change their minds, as they have the right to do under the appropriate act. This brings us, then, for present purposes, to consider, (1) whether the suit is necessarily against the United States, and if it is not, (2) whether Congress has otherwise provided an adequate remedy in the amendment of 1944, authorizing redetermination in a proceeding in the Tax Court.

We are not unmindful of the difficulty of stating an exact formula for determining when a suit against an officer is a suit against the United States. *Brooks* v. *Dewar*, 313 U. S. 354, 359, 61 S. Ct. 979, 85 L. Ed. 1399. But where the relief asked is that the officer be restrained from acting to enforce an unconstitutional law in such a way as to injure the property rights of the plaintiff, the proceeding is one against the officer. The single exception is the situation in which the United States, because of the nature of the decree to be issued, are indispensable parties to the suit. If, for example, the object is to compel specific performance of a contract between the United States and the plaintiff, or to compel an officer to pay money out of the Treasury or otherwise to hand over to the plaintiff property which the United States claim to own, or to prevent the United States from

using property which they own, or claim to own—in all these cases the United States are the real parties in interest and the suit must fail. But the effect of an injunction in this case would not be to compel specific performance of a Government contract or payment of money out of the Treasury. The injunction would simply prevent a Government official from acting under an unconstitutional statute (if it should be found to be such), so as to interfere with valid contract relations between Lincoln and its customers. Whether the contracts will eventually be performed, and whether the money will be paid to Lincoln, depends upon many other circumstances which are not involved in the present action, and the right of the United States to withhold money owing to Lincoln is unaffected by anything which is asked for here.

If this is a correct statement of the case we have, then it would seem to follow that the suit is not against the United States and the dictrine announced in *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764, would be controlling. At page 159 of 209 U. S., 28 S. Ct. at page 454, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764, the Supreme Court said:

"The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the State, to enforce legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

And see *United States* v. *Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171; *Philadelphia Co.* v. *Stimson*, 1912, 223 U. S.

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605, 32 S. Ct. 340, 56 L. Ed. 570; *Thompson* v. *Deal*, 67 App. D. C. 327, 92 F. 2d 478; *Ickes* v. *Fox*, 1937, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 1939, 306 U. S. 118, 59 S. Ct. 366, 83 L. Ed. 543; *Lane* v. *Watts*, 1914, 234 U. S. 525, 540, 34 S. Ct. 965, 58 L. Ed. 1440; *Goltra* v. *Weeks*, 1926, 271 U. S. 536, 46 S. Ct. 613, 70 L. Ed. 1074; *Franklin Township* v. *Tugwell*, 1936, 66 App. D. C. 42, 85 F. 2d 208.

Nor do we think plaintiff has elsewhere and otherwise an adequate remedy. The right to go to the Tax Court did not accrue until long after this suit was instituted, and even if it be considered that the relief afforded by the Tax Court provision is obligatory and exclusive, that certainly is not the case where, as here, it did not exist when suit was brought. *Dawson* v. *Kentucky Distilleries & W. Co.*, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638. Nor is the right to sue the United States in the Court of Claims in the circumstances of this case an adequate remedy; for there is no such right there as to plaintiff's thousands of customers who necessarily would have to be sued separately and where they reside.

Plaintiff brought this suit in the only court having jurisdiction of the persons of the defendants. The controversy, as we have mentioned briefly, grows out of an Act of Congress designed to protect the United States against losses through improvident contracts made by officers of the Government in the war effort. Plaintiff insists that this legislation, as applied to the facts of this case, is unconstitutional, in that it is repugnant to Article I, Section 1, and Article I, Section 8, of the Constitution, and likewise repugnant to the Fifth and Tenth Amendments to the Constitution; that in the year in question all contracts made by it for the sale and disposition of its products were made upon the basis of fixed and stable prices, as to which there were no increases as the result of the war, and that in accepting orders from its customers, the same were taken upon an express agreement that there should be no readjustment or renegotiation of prices. Plaintiff further charges that if the Secretary is permitted to renegotiate its contract, not only with the United States, but with its

various customers, who in turn have contracted with the United States, the result would be to seriously impair its financial structure and would otherwise irreparably injure its capacity to operate successfully.

Defendants insist that, notwithstanding this and granting also that the Act of Congress is unconstitutional, plaintiff has no other recourse than to challenge the claimed right of the Government in the Tax Court or in the Court of Claims.

We think this is not sufficient. In our opinion the case should be tried on the merits and plaintiff given the opportunity of proving its case, and the question of the constitutionality of the Act of Congress should be briefed and argued. The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts, without an adequate and proper hearing. If the Renegotiation Act is in all respects valid, obviously, plaintiff has no case. If, on the other hand, it is invalid, and the Government, as we have indicated, is not an essential party, then, clearly, plaintiff ought not to be stopped at the threshold of the court and told to seek relief in some other court and in some other manner obviously inadequate and incomplete.

The motion for summary judgment is denied, and an appropriate order will be entered accordingly.

Opinion of the Court Granting Appellee's Motion and Dismissing Complaint (Filed July 14, 1947)

Civil Action No. 21866

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LINCOLN ELECTRIC COMPANY, *Plaintiff*,

v.

FRANK KNOX and JAMES V. FORRESTAL, *Defendants*

Our decision of this case has been awaiting the decision of the Supreme Court in *Aircraft & Diesel Equipment Corporation* v. *Hirsch, et al.* In that case the Supreme Court on June 16, 1947 affirmed the decision of the District Court. In our opinion the instant case is controlled by that opinion of the Supreme Court and also by the case of *Wade* v. *Stimson* affirmed *per curiam* by that Court on the same day.

The plaintiff had its opportunity to pursue its administrative remedy and failed to take advantage of it.

The motion of the defendant for a summary judgment will be sustained and the complaint dismissed.

(S.) D. LAWRENCE GRONER,
U. S. Circuit Judge;
(S.) JENNINGS BAILEY,
U. S. District Judge;
(S.) T. ALAN GOLDSBOROUGH,
U. S. District Judge.

Order Issued by Appellee on October 23, 1943 Under Renegotiation Act

THE SECRETARY OF THE NAVY

WASHINGTON

Oct 23, 1943.

The Lincoln Electric Company
Cleveland, Ohio.

Subject: Renegotiation of The Lincoln Electric Company for the year ended December 31, 1942, pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended.

DEAR SIRS:

I have given careful consideration to your letter of October 18, 1943, addressed to me by J. F. Lincoln, President. I assume this constitutes your final presentation in this case and that you have no additional information or contentions to present to me which you deem are material to my determination of the amount of your excessive profits for said period and the renegotiability of the contracts and subcontracts giving rise thereto. The renegotiations between The Lincoln Electric Company for said period and the Navy Department appear, therefore, to have been concluded.

I have examined certain financial, operating and other data submitted by you, or obtained by me from governmental or other reliable sources, relating to the profits realized by you during said year under your contracts and subcontracts subject to renegotiation under said Section 403. You have been granted full opportunity to submit such additional information and to present such contentions as you deemed material in determining the excessiveness of said profits and the renegotiability of said contracts and subcontracts at hearings, of which due notice was given, and I have duly considered all of the financial, operating and other data and information so furnished, or obtained, and each of the contentions so presented.

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As a result of such renegotiation and pursuant to the authority and discretion vested in the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration and the respective Boards of Directors of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation and Rubber Reserve Company under the provisions of Section 403, and duly delegated to me under subsection (f) thereof, I hereby find and determine that $3,250,000 of the profits realized by you during the year ended December 31, 1942, under your contracts and subcontracts subject to renegotiation pursuant to the provisions of Section 403, are excessive, plus such amount of the costs recorded on your books for such year which eventually are disallowed by the Bureau of Internal Revenue. In connection with the payment or discharge of such excessive profits, you shall be granted any tax credit to which you may be entitled under Section 3806 of the Internal Revenue Code.

Unless action is taken by you not later than November 5, 1943, to eliminate such excessive profits in a manner satisfactory to me, appropriate action in this respect will be taken by me without further notice to you, by directing the withholding of amounts otherwise due to you, as a contractor or subcontractor, by the Government and by prime contractors with the Government.

Very truly yours,

(Signed) JAMES FORRESTAL,
Acting Secretary of the Navy.

Text of Renegotiation Act and Amendments Thereto

The Renegotiation Act in question in this suit has been amended. Accordingly, the statute as it now appears in the Code is not the statute the Court has before it in this case.

In order, therefore, that the Court may have the statute in question in this suit conveniently before it, there are set forth herein the original Act and the subsequent amendments thereof.

Original Renegotiation Act

The original Renegotiation Act was enacted April 28, 1942, as Public Law 528, 77th Congress, 2d Session, 56 Stat. 226, 245. It reads:

SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States or the repayment to the United States of

(A) any amount of the contract price which is found as a result of such renegotiation to represent excessive profits and

(B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract

(A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty,

(B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and

(C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder,

(1) to require the contractor or subcontractor to renegotiate the contract price,

(2) to withhold from the contractor or subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and

(3) in case any amount of the contract price found as a result of such reengotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor.

Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United

States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other compensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of

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actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who wilfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

First Amendment, October 21, 1942

[Adding Treasury Department to renegotiating agencies and defining subcontracts]

On October 21, 1942, the Renegotiation Act was amended by Section 801 of the Revenue Act of 1942, Public Law 753, 77th Congress, 56 Stat. 798, 982.

The amending statute reads:

SEC. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission.

(3) The terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price.

(4) The term "excessive profits" means any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits.

(5) The term "subcontract" means any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term "article" includes any material, part, assembly, machinery, equipment, or other personal property.

For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.

(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department—

(1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty;

(2) a provision for the retention by the United States from amounts otherwise due the contractor, or for the repayment by him to the United States, if paid to him, of any excessive profits not eliminated through reductions in the contract price, or otherwise, as the Secretary may direct;

(3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract

(i) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty,

(ii) a provision for the retention by the contractor for the United States of the amount of any reduction in the contract price of any subcontract pursuant to its renegotiation hereunder, or for the repayment by the subcontractor to the United States of any excessive profits from such subcontract paid to him and not eliminated through reductions in the contract price or otherwise, as the Secretary may direct, and

(iii) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by the contractor or repaid by the subcontractor to the United States, and

(iv) in the discretion of the Secretary, a provision requiring any subcontractor to insert in any subcontract made by him under such subcontract, provisions corresponding to those of subparagraphs (3) and (4) of this subsection (b); and

(4) a provision for the retention by the United States from amounts otherwise due the contractor, or for repayment by him to the United States, as the Secretary may direct, of the amount of any reduction in the contract price of any subcontract under such contract, which the contractor is directed, pursuant to clause (3) of this subsection, to withhold from payments otherwise due the subcontractor and actually unpaid at the time the contractor receives such direction.

The provision for the renegotiation of the contract price, in the discretion of the Secretary,

(i) may fix the period or periods when or within which renegotiation shall be had; and

(ii) if in the opinion of the Secretary the provisions of the contract or subcontract are otherwise adequate to prevent excessive profits, may provide that renegotiation shall apply only to a portion of the contract or subcontract or shall not apply to performance during a specified period or periods and may also provide that the contract price in effect during any such period or periods shall not be subject to renegotiation.

(c) (1) Whenever, in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any sub-

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contract thereunder whether or not made by the contractor, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor to renegotiate the contract price. When the contractor or subcontractor holds two or more contracts or subcontracts the Secretary in his discretion, may renegotiate to eliminate excessive profits on some or all of such contracts and subcontracts as a group without separately renegotiating the contract price of each contract or subcontract.

(2) Upon renegotiation, the Secretary is authorized and directed to eliminate any excessive profits under such contract or subcontract

(i) by reductions in the contract price of the contract or subcontract, or by other revision in its term; or

(ii) by withholding, from amounts otherwise due to the contractor or subcontractor, any amount of such excessive profits; or

(iii) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to the subcontractor, any amount of such excessive profits under the subcontract; or

(iv) by recovery from the contractor or subcontractor, through repayment, credit or suit, of any amount of such excessive profits actually paid to him; or

(v) by any combination of these methods, as the Secretary deems desirable.

The Secretary may bring actions on behalf of the United States in the appropriate courts of the United States to recover from such contractor or subcontractor, any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive

profits thereon. All money recovered by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts.

(3) In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code. In determining the amount of any excessive profits to be eliminated hereunder the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code.

(4) Upon renegotiation pursuant to this section, the Secretary may make such final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section, as the Secretary deems desirable. Such agreements may cover such past and future period or periods, may apply to such contract or contracts of the contractor or subcontractor, and may contain such terms and conditions, as the Secretary deems advisable. Any such agreement shall be final and conclusive according to its terms; and except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact,

(i) such agreement shall not be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States; and

(ii) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

(5) Any contractor or subcontractor who holds contracts or subcontracts, to which the provisions of this section are applicable, may file with the Secretaries of all the Departments concerned statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation. Within one year after the filing of such statements, or within such shorter period as may be prescribed by such joint regulation, the Secretary of a Department may give the contractor or subcontractor written notice, in form and manner to be prescribed in such joint regulation, that the Secretary is of the opinion that the profits realized from some or all of such contracts or subcontracts may be excessive, and fixing a date and place for an initial conference to be held within sixty days thereafter. If such notice is not given and renegotiation commenced by the Secretary within such sixty days the contractor or subcontractor shall not thereafter be required to renegotiate to eliminate excessive profits realized from any such contract or subcontract during such fiscal year or years and any liabilities of the contractor or subcontractor for excessive profits realized during such period shall be thereby discharged.

(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless

(i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or

(ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is

exempted under subsection (i), of this section 403, or

(iii) the aggregate sales by the contractor or subcontractor and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the contract or subcontract, as determined by the Secretary, occurs.

(b) Subsection (f) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended to read as follows:

(f) Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, or in any other Department with the consent of the Secretary of that Department, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(c) Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), is amended by adding at the end thereof the following subsections:

(i) (1) The provisions of this section shall not apply to—

(i) any contract by a Department with any other department, bureau, agency, or governmental

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corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

(ii) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; and the Secretaries are authorized by joint regulation, to define, interpret, and apply this exemption.

(2) The Secretary of a Department is authorized, in his discretion, to exempt from some or all of the provisions of this section—

(i) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

(ii) any contracts or subcontracts under which, in the opinion of the Secretary, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days; and

(iii) a portion of any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Secretary, the provisions of the contract are otherwise adequate to prevent excessive profits.

The Secretary may so exempt contracts and subcontracts both individually and by general classes or types.

(j) Nothing in Sections 109 and 113 of the Criminal Code (U. S. C., Title 18, Secs. 198 and 203) or in Section 190 of the Revised Statutes (U. S. C., Title 5, Sec. 99) shall be deemed to prevent any person appointed by the Secretary of a Department for intermittent and temporary employment in such Department, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided,* That such person shall not prosecute any claim against the United States (1) which arises from any matter directly connected with which such person is employed, or (2) during the period such person is engaged in intermittent and temporary employment in a Department.

(d) The amendments made by this section shall be effective as of April 28, 1942.

SECOND AMENDMENT, JULY 1, 1943

[Adding Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company to renegotiating agencies.]

The second amendment came on July 1, 1943, by Section 1 of the Military Appropriation Act, 1944, Public Law 108, 78th Congress, 57 Stat. 347, 348. This amending act reads:

Provided further, That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows:

SEC. 403. (a) For the purposes of this section—

1. The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

2. In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commis-

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sion, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

Provided further, That section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is further amended by adding at the end thereof the following subsection:

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

THIRD AMENDMENT, JULY 14, 1943

[Adding War Brokers' Contracts.]

The statute was amended again on July 14, 1943 by Public Law 149, 78th Congress, 57 Stat. 564, to subject war brokers' contracts to the statute. The amending act reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of section 403 (a) (5) of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is amended to read as follows: "The term 'subcontract' means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or sub-

contract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts thereunder: *Provided*, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in (ii) herein, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract thereunder."

SEC. 2. Section 403 (b) (3) of such Act, as amended, is amended by striking out "in each subcontract for an amount in excess of $100,000" and inserting in lieu thereof "in each subcontract described in subsection (a) (5) (ii) and in each subcontract for an amount in excess of $100,000 described in subsection (a) (5) (i)."

SEC. 3. The first paragraph of section 403 (c) (6) of such Act, as amended, is amended to read as follows:

"(6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942; or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403; or (iii) the aggregate sales by and amounts payable to the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder (including those described in clauses (i)

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and (ii) of this subsection (6), but excluding subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $100,000, and under subcontracts described in subsection (a) (5) (ii) do not exceed, or in the opinion of the Secretary will not exceed, $25,000, for the fiscal year of such contractor or subcontractor."

SEC. 4. Section 403 (e) of such Act, as amended, is amended by striking out "in an aggregate amount in excess of $100,000."

SEC. 5. The amendments made by this Act shall be effective as of April 28, 1942.

Fourth Amendment, February 25, 1944.

[Revising Renegotiation Act.]

The statute was entirely revised by Title VII, Section 701 of the Revenue Act of 1943, enacted February 25, 1944, Public Law 235, 78th Congress, 58 Stat. 21, 78. As then revised the statute reads:

SEC. 701. RENEGOTIATION OF WAR CONTRACTS.

(a) TERMS USED.—Terms used in this section shall have the same meaning as when used in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

Applicable Only to Fiscal Years Ending After June 30, 1943.

(b) RENEGOTIATION OF WAR CONTRACTS.—Section 403, as amended, of the Sixth Supplemental National Defense Appropriation Act, 1942, is amended to read as follows:

"SEC. 403. (a) For the purposes of this section—

"(1) The term 'Department' means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

"(2) In the case of the Maritime Commission, the term 'Secretary' means the Chairman of such Commission, in the case of the War Shipping Administration, the term 'Secretary' means the Administrator of such Administration, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term 'Secretary' means the board of directors of the appropriate corporation.

"(3) The terms 'renegotiate' and 'renegotiation' include a determination by agreement or order under this section of the amount of any excessive profits.

"(4) (A) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive. In determining excessive profits there shall be taken into consideration the following factors:

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(i) efficiency of contractor, with particular regard to attainment of quantity and quality production, reduction of costs and economy in the use of materials, facilities, and manpower;

"(ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earnings, and comparison of war and peace time products;

"(iii) amount and source of public and private capital employed and net worth;

"(iv) extent of risk assumed, including the risk incident to reasonable pricing policies;

"(v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

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"(vii) such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.

"(B) The term 'profits derived from contracts with the Departments and subcontracts' means the excess of the amount received or accrued under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so employed does not, in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States, such item is unreasonable or not properly chargeable to such contract or subcontract. Notwithstanding any other provisions of this section, all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts (or, in the case of the recomputation of the amortization deduction, allocable to contracts with the Departments and subcontracts), be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal taxes, which are attributable to the portion of the profits which are not excessive.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(C) Notwithstanding any of the provisions of this section to the contrary, no amount shall be allowed as an item of cost (i) by reason of a recomputation of the amortization deduction pursuant to section 124 (d) of the Internal Revenue Code until after such recomputation has been made in connection with a determination of the taxes imposed by Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code for the fiscal year to which the excessive profits determined by the renegotiation are attributable or (ii) by reason of the application of a carry-over or carry-back under any circumstances. The absence of such a recomputation of the amortization deductions referred to in clause (i) above shall not constitute a cause for postponing the making of an agreement, or the entry of an order, determining the amount of excessive profits, or for staying the elimination thereof.

Made Retroactive to April 28, 1942.

"(D) Notwithstanding any of the provisions of subsection (c) (4) of this section to the contrary, in the case of a renegotiation which is made prior to such recomputation, there shall be repaid by the United States (without interest) to the contractor or subcontractor after such recomputation the amount of a net renegotiation rebate computed in the following described manner. There shall first be ascertained the portion of the excessive profits determined by the renegotiation which is attributable to the fiscal year with respect to which a net renegotiation rebate is claimed by the contractor or subcontractor (hereinafter referred to as 'renegotiated year'). There shall then be ascertained the amount of the gross renegotiation rebate for the renegotiated year, which amount shall be an allocable part of the additional amortization deduction which is allowed for the renegotiated year upon the recomputation made pursuant to section 124 (d) of the Internal Revenue Code in connection with the determination of the taxes for such year and which is attributable to contracts with the Departments and subcontracts, except that the amount of the gross renegotiation rebate shall not exceed the amount of excessive profits eliminated for the renegotiated year

Made Retroactive to April 28, 1942.

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pursuant to the renegotiation. The allocation of the additional amortization deduction attributable to contracts with the Departments and subcontracts, and the allocation of the additional amortization deduction to the renegotiated year shall be determined in accordance with regulations prescribed by the Board. There shall then be ascertained the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for the renegotiated year. Such Federal tax benefit shall be the amount by which the taxes for the renegotiated year under Chapters 1, 2A, 2B, 2D, and 2E of the Internal Revenue Code were decreased by reason of omitting from gross income (or by reason of the application of the provisions of section 3806 (a) of the International Revenue Code with respect to) that portion of the excessive profits for the renegotiated year which is equal to the amount of the gross renegotiation rebate. The amount by which the gross renegotiation rebate for the renegotiated year exceeds the amount of the contractor's or subcontractor's Federal tax benefit from the renegotiation for such year shall be the amount of the net renegotiation rebate for such year.

Made Retroactive to April 28, 1942.

"(5) The term 'subcontract' means—

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(A) Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract, but such term does not include any purchase order or agreement to furnish office supplies; or

"(B) Any contract or arrangement other than a contract or arrangement between two contracting parties, one of which parties is found by the Board to be a bona fide executive officer, partner, or full-time employee of the other contracting party, (i) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts, or determined with reference to the amount of such a contract or subcon-

tract or such contracts or subcontracts, or (ii) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department or a subcontract or subcontracts: *Provided*, That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary or the Board to determine the nature or amount of selling expenses under subcontracts as defined in this subparagraph, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(6) The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property.

"(7) The term 'standard commercial article' means an article—

"(A) which is identical in every material respect with an article which was manufactured and sold, and in general civilian, industrial, or commercial use prior to January 1, 1940,

"(B) which is identical in every material respect with an article which is manufactured and sold, as a competitive product, by more than one manufacturer, or which is an article of the same kind and having the same use or uses as an article manufactured and sold, as a competitive product, by more than one manufacturer, and

"(C) for which a maximum price has been established and is in effect under the Emergency Price Control Act of 1942, as amended, or under the Act of October 2, 1942, entitled 'An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes,' or which is sold at

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a price not in excess of the January 1, 1941, selling price.

An article made in whole or in part of substitute materials but otherwise identical in every material respect with the article with which it is compared under subparagraphs (A) and (B) shall be considered as identical in every material respect with such article with which it is so compared.

"(8) The term 'fiscal year' means the taxable year of the contractor or subcontractor under Chapter 1 of the Internal Revenue Code.

"9. The terms 'received or accrued' and 'paid or incurred' shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books.

"(b) Subject to subsection (i), the Secretary of each Department is authorized and directed to insert in each contract made by such Department thirty days or more after the date of the enactment of the Revenue Act of 1943 and involving an estimated amount of more than $100,000, a provision under which the contractor agrees—

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(1) to the elimination of excessive profits through renegotiation;

"(2) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, if paid to him, any excessive profits;

"(3) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, a provision under which the subcontractor agrees—

"(A) to the elimination of excessive profits through renegotiation;

"(B) that there may be retained by the contractor for the United States from amounts otherwise due the subcontractor, or that the subcontractor will repay to the United States, if paid to him, any excessive profits;

"(C) that the contractor shall be relieved of all liability to the subcontractor on account of any amount so retained, or so repaid by the subcontractor to the United States;

"(D) that he will insert in each subcontract described in subsection (a) (5) (A) involving an estimated amount of more than $100,000, and in each subcontract described in subsection (a) (5) (B) involving an estimated amount of more than $25,000, provisions corresponding to those of subparagraphs (A), (B), and (C) and to those of this subparagraph;

"(4) that there may be retained by the United States from amounts otherwise due the contractor, or that he will repay to the United States, as the Secretary may direct, any amounts which under paragraph (3) (B) the contractor is directed to withhold from a subcontractor and which are actually unpaid at the time the contractor receives such direction.

Applicable Only to Fiscal Years Ending After June 30, 1943.

The obligations assumed by the contractor or subcontractor under paragraph (1) or (3) (A), as the case may be, agreeing to the elimination of excessive profits through renegotiation shall be binding on him only if the contract or subcontract, as the case may be, is subject to subsection (c). A provision inserted in a contract or subcontract, which recites in substance that the contract or subcontract shall be deemed to contain all the provisions required by this subsection shall be sufficient compliance with this subsection. Whether or not there is inserted in a contract with a Department or subcontract, to which subsection (c) is applicable, the provisions specified in this subsection, such contract or subcontract, as the case may be, shall be considered as having been made subject to such subsection

in the same manner and to the same extent as if such provisions had been inserted.

"(c) (1) Whenever, in the opinion of the Board, the amounts received or accrued under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. The mailing of such notice by registered mail to the contractor or subcontractor shall constitute the commencement of the renegotiation proceeding. At the conference, which may be adjourned from time to time, the Board shall endeavor to make a final or other agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in subsection (c) (1), such order shall be final and conclusive and shall not be subject to review or redetermination by any court or other agency. The Board shall exercise its powers with respect to the aggregate of the amounts received or accrued during the fiscal year (or such other period as may be fixed by mutual agreement) by a contractor or subcontractor under contracts with the Departments and subcontracts, and not separately with respect to amounts received or accrued under separate contracts with the Departments or subcontracts, except that the Board may exercise such powers separately with respect to amounts received or accrued by the contractor or subcon-

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tractor under any one or more separate contracts with the Departments or subcontracts at the request of the contractor or subcontractor. Whenever the Board makes a determination with respect to the amount of excessive profits, whether such determination is made by order or is embodied in an agreement with the contractor or subcontractor, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

"(2) Upon the making of an agreement or the entry of an order, under paragraph (1) by the Board, or the entry of an order under subsection (e) by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits (A) by reductions in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms; or (B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits; or (C) by directing a contractor to withhold for the account of the United States, from amounts otherwise due to a subcontractor, any amount of such excessive profits of such subcontractor; or (D) by recovery from the contractor, through repayment, credit, or suit any amount of such excessive profits actually paid to him; or (E) by any combination of these methods, as is deemed desirable. Actions on behalf of the United States may be brought in the appropriate courts of the United States to recover from the contractor any amount of such excessive profits actually paid to him and not withheld or eliminated by some other method under this subsection. The surety under a contract or subcontract shall not be liable for the repayment of any excessive profits thereon. Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts with-

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held from such subcontractor pursuant to this paragraph. All money recovered in respect of amounts paid to the contractor from appropriations from the Treasury by way of repayment or suit under this subsection shall be covered into the Treasury as miscellaneous receipts. Upon the withholding of any amount of excessive profits or the crediting of any amount of excessive profits against amounts otherwise due a contractor, the Secretary shall certify the amount thereof to the Treasury and the appropriations of his Department shall be reduced by an amount equal to the amount so withheld or credited. The amount of such reductions shall be transferred to the surplus fund of the Treasury. In eliminating excessive profits the Secretary shall allow the contractor or subcontractor credit for Federal income and excess profits taxes as provided in section 3806 of the Internal Revenue Code. For the purposes of this paragraph the term 'contractor' includes a subcontractor.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were received or accrued, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to

a delegation of authority under subsection (d) (4), such one-year limitation shall not apply to review of such order by the Board, and (B) such one-year period may be extended by mutual agreement.

"(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(5) (A) Every contractor and subcontractor who holds contracts or subcontracts, to which the provisions of this subsection are applicable, shall, in such form and detail as the Board may by regulations prescribe, file with the Board on or before the first day of the fourth month following the close of the fiscal year (or if such fiscal year has closed on the date of the enactment of the Revenue Act of 1943, on or before the first day of the fourth month following the month in which such date of enactment falls), a financial statement setting forth such information as the Board may by regulations prescribe as necessary to carry out this section. In addition to the statement required under the preceding sentence, every such contractor or subcontractor shall, at such time or times and in such form and detail as the Board may by regulations prescribe, furnish the Board any information, records, or data which is determined by the Board to be necessary to carry out this section. Any person who wilfully fails or refuses to fur-

nish any statement, information, records, or data required of them under this subsection, or who knowingly furnishes any such statement, information, records, or data containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both.

"(B) For the purposes of this section the Board shall have the same powers with respect to any such contractor or subcontractor that any agency designated by the President to exercise the powers conferred by Title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of the Board and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purpose of making examinations and audits under this section.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts received or accrued thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) (B)) do not exceed $500,000 and under subcontracts described in subsection (a) (5) (B) do not exceed $25,000 for such fiscal year. If such fiscal year is a fractional part of twelve

months, the $500,000 amount and the $25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph.

"(d) (1) There is hereby created a War Contracts Price Adjustment Board (in this section called the 'Board'), which shall consist of six members. One of the members shall be an officer or employee of the Department of War and shall be appointed by the Secretary of War, one shall be an officer or employee of the Department of the Navy and shall be appointed by the Secretary of the Navy, one shall be an officer or employee of the Department of the Treasury and shall be appointed by the Secretary of the Treasury, one shall be an officer or employee of the United States Maritime Commission or the War Shipping Administration and shall be appointed jointly by the Chairman of the United States Maritime Commission and the Administrator of the War Shipping Administration, one shall be an officer or employee of the Reconstruction Finance Corporation and shall be appointed by the Chairman of the board of directors of the Reconstruction Finance Corporation, and one shall be an officer or employee of the War Production Board and shall be appointed by the Chairman of the War Production Board. The members of the Board shall not receive additional compensation for service on the Board but shall be allowed and paid necessary travel and subsistence expenses (or a per diem in lieu thereof) while away from their official station on duties of the Board. They shall elect a chairman from among their members. The Board shall have a seal which shall be judicially noticed.

Effective as of Feb. 25, 1944.

"(2) The principal office of the Board shall be in the District of Columbia, but it or any division thereof may meet and exercise its powers at any other place within the United States. The Board may establish such number of field offices throughout the United States as it deems necessary to expedite the work of the Board. Four members of the Board shall constitute a quorum, and any power, function, or duty of the Board may be exercised or per-

formed by a majority of the members present if the members present constitute at least a quorum.

"(3) The Board is authorized, subject to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers and employees as it deems necessary to assist it in carrying out its duties under this section. The Board may, with the consent of the head of the Department, agency, or instrumentality of the United States concerned, utilize the services of any officers or employees of the United States, and reimburse such Department, agency, or instrumentality for the services so utilized.

Effective as of Feb. 25, 1944.

"(4) The Board may delegate in whole or in part any power, function, or duty to the Secretary of a Department, and any power, function, or duty so delegated may be delegated in whole or in part by the Secretary to such officers or agencies of the United States as he may designate, and he may authorize successive redelegations of such powers, functions, and duties.

"(5) The chairman of the Board may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more than one member, designate the chief thereof. The Board may also, by regulations or otherwise, determine the character of cases to be conducted initially by the Board through an officer or officers of, or utilized by, the Board, the character of cases to be conducted initially by the various officers and agencies authorized to exercise powers of the Board pursuant to paragraph (4), the character of cases to be conducted initially by the various divisions of the Board, and the character of cases to be conducted initially by the Board itself. The Board may review any determination by any such officer, agency, or division on its own motion, or in its discretion at the request of any contractor or subcontractor aggrieved thereby. Unless the Board upon its own motion initiates a review of such determination within 60 days from the date of such determina-

tion, or at the request of the contractor or subcontractor made within 60 days from the date of such determination initiates a review of such determination within 60 days from the date of such request, such determination shall be deemed the determination of the Board. Upon any review by the Board the Board may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the officer, agency, or division whose action is so reviewed.

Effective as of Feb. 25, 1944.

"(e) (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, insofar as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections, 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to rede-

Applicable Only to Fiscal Years Ending After June 30, 1943.

termine a deficiency. in the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(2) Any contractor or subcontractor (excluding a subcontractor described in subsection (a) (5) (B)) aggrieved by a determination of the Secretary made prior to the date of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of the enactment of the Revenue Act of 1943, file a petition with The Tax Court of the United States for a redetermination thereof, and any such contractor or subcontractor aggrieved by a determination of the Secretary made on or after the date of the enactment of the Revenue Act of 1943, with respect to any such fiscal year, as to the existence of excessive profits, which is not embodied in an agreement with the contractor or subcontractor, may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the date of such determination, file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have the same jurisdiction, powers, and duties, and the proceeding shall be subject to the same provisions, as in the case of a petition filed with the court under paragraph (1), except that the amendments made to this section by the Revenue Act of 1943 which are not made applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply.

Effective as of Feb. 25, 1944.

"(f) For repricing of war contracts, see Title VIII of the Revenue Act of 1943.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

"(h) This section shall apply only with respect to profits derived from contracts with the Departments and subcontracts which are attributable to performance prior to the termination date. For the purposes of this subsection—

"(1) The profits derived from any contract with a Department or subcontract which shall be deemed 'attributable to performance prior to the termination date' shall be—

"(A) in the case of any contract or subcontract the performance of which requires more than twelve months, or in the case of any contract or subcontract with respect to which the powers of the Board are exercised separately pursuant to subsection (c) (1) rather than on a fiscal-year basis, the portion of the profits so derived which is determined by the Board to be equal to the same percentage of the total profits so derived as the percentage of completion of the contract prior to the termination date; and

"(B) in all other cases, the profits so derived which are received or accrued prior to the termination date; and

"(2) The term 'termination date' means—

"(A) December 31, 1944; or

"(B) If the President not later than December 1, 1944, finds and by proclamation declares that competitive conditions have not been restored, such date not later than June 30, 1945, as may be specified by the President in such proclamation as the termination date; or

"(C) If the President, not later than June 30, 1945, finds and by proclamation declares that competitive conditions have been restored as of any date within six months prior to the issuance of such proclamation, the date as of which the President in such proclamation declares that competitive conditions have been restored;

Applicable Only to Fiscal Years Ending After June 30, 1943.

except that in no event shall the termination date extend beyond the date proclaimed by the President as the date of the termination of hostilities in the present war, or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

"(i) (1) The provisions of this section shall not apply to—

"(A) any contract by a Department with any other department, bureau, agency, or governmental corporation of the United States or with any Territory, possession, or State or any agency thereof or with any foreign government or any agency thereof; or

"(B) any contract or subcontract for the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, which has not been processed, refined, or treated beyond the first form or state suitable for industrial use; or

"(C) any contract or subcontract for an agricultural commodity in its raw or natural state, or if the commodity is not customarily sold or has not an established market in its raw or natural state, in the first form or state, beyond the raw or natural state, in which it is customarily sold or in which it has an established market. The term 'agricultural commodity' as used herein shall include but shall not be limited to—

Made Retroactive to April 28, 1942.

"(i) commodities resulting from the cultivation of the soil such as grains of all kinds, fruits, nuts,

vegetables, hay, straw, cotton, tobacco, sugar cane, and sugar beets,

"(ii) natural resins, saps and gums of trees;

"(iii) animals such as cattle, hogs, poultry, and ship, fish and other marine life, and the produce of live animals, such as wool, eggs, milk and cream; or

Made Retroactive to April 28, 1942.

"(D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(E) any contract with a Department, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility; or

Made Retroactive to April 28, 1942.

"(F) any subcontract directly or indirectly under a contract or subcontract to which this section does not apply by reason of this paragraph.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(2) The Board is authorized by regulation to interpret and apply the exemptions provided for in paragraph (1) (A), (B), (C), (E), and (F), and interpret and apply the definition contained in subsection (a) (7).

"(3) In the case of a contractor or subcontractor who produces or acquires the product of a mine, oil or gas well, or other mineral or natural deposit, or timber, and processes, refines, or treats such a product to and beyond the first form or state suitable for industrial use, or who produces or acquires an agricultural product and processes, refines, or treats such a product to and beyond the first form or state in which it is customarily sold or in which it has an established market, the Board shall prescribe such regulations as may be necessary to give such contractor or subcontractor a cost allowance substantially

Made Retroactive to April 28, 1942.

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equivalent to the amount which would have been realized by such contractor or subcontractor if he had sold such product at such first form or state. Notwithstanding any other provisions of this section, there shall be excluded from consideration in determining whether or not a contractor or subcontractor has received or accrued excessive profits that portion of the profits, derived from contracts with the Departments and subcontracts, attributable to he increment in value of the excess inventory. For the purposes of this paragraph the term 'excess inventory' means inventory of products, hereinbefore described in this paragraph, acquired by the contractor or subcontractor in the form or at the state in which contracts for such products on hand or on contract would be exempted from this section by subsection (i) (1) (B) or (C), which is in excess of the inventory reasonably necessary to fulfill existing contracts or orders. That portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory, and the method of excluding such portion of profits from consideration in determining whether or not the contractor or subcontractor has received or accrued excessive profits, shall be determined in accordance with regulations prescribed by the Board. In the case of a renegotiation with respect to a fiscal year ending prior to July 1, 1943, the portion of the profits, derived from contracts with the Departments and subcontracts, attributable to the increment in value of the excess inventory shall (to the extent such portion does not exceed the excessive profits determined) be credited or refunded to the contractor or subcontractor, and in case the determination of excessive profits was made prior to the date of the enactment of the Revenue Act of 1943, such credit or refund shall be made notwithstanding such determination is embodied in an agreement with the contractor or subcontractor, but in either case such credit or refund shall be made only if the contractor or subcontractor, within ninety days after the date of the enactment of the Revenue Act of 1943, files a claim therefor with the Secretary concerned.

Made Retroactive to April 28, 1942.

"(4) The Board is authorized, in its discretion, to exempt from some or all of the provisions of this section—

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(A) any contract or subcontract to be performed outside of the territorial limits of the continental United States or in Alaska;

"(B) any contracts or subcontracts under which, in the opinion of the Board, the profits can be determined with reasonable certainty when the contract price is established, such as certain classes of agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum price for the sale of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under such contract or subcontract will not be in excess of thirty days;

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(C) any contract or subcontract or performance thereunder during a specified period or periods, if in the opinion of the Board, the provisions of the contract are otherwise adequate to prevent excessive profits;

"(D) any contract or subcontract for the making or furnishing of a standard commercial article, if, in the opinion of the Board, competitive conditions affecting the sale of such article are such as will reasonably protect the Government against excessive prices;

"(E) any contract or subcontract, if, in the opinion of the Board, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to the contract or subcontract price; and

"(F) any subcontract or group of subcontracts not otherwise exempt from the provisions of this section, if, in the opinion of the Board, it is not administratively feasible in the case of such subcontract or in the case of such group of subcontracts to determine and segregate the profits attributable to such subcon-

tract or group of subcontracts from the profits attributable to activities not subject to renegotiation.

The Board may so exempt contracts and subcontracts both individually and by general classes or types.

"(j) Nothing in sections 109 and 113 of the Criminal Code (U. S. C., title 18, secs. 198 and 203) or in section 190 of the Revised Statutes (U. S. C., title 5, sec. 99) shall be deemed to prevent any person by reason of service in a Department or the Board during the period (or a part thereof) beginning May 27, 1940, and ending six months after the termination of hostilities in the present war, as proclaimed by the President, from acting as counsel, agent, or attorney for prosecuting any claim against the United States: *Provided*, That such person shall not prosecute any claim against the United States (1) involving any subject matter directly connected with which such person was so employed, or (2) during the period such person is engaged in employment in a Department.

Applicable Only to Fiscal Years Ending After June 30, 1943.

"(k) Nothing in this section shall be construed to limit or restrict any authority or discretion of the Secretary of a Department under the provisions of any other law.

"(l) This section may be cited as the 'Renegotiation Act.'"

Made Retroactive to April 28, 1942.

(c) TECHNICAL AMENDMENTS.—(1) Section 3806 (a) (1) (B) and (C) of the Internal Revenue Code (relating to mitigation of effect of renegotiation of war contracts) are respectively amended by striking out "by the Revenue Act of 1942."

Applicable Only to Fiscal Years Ending After June 30, 1943.

(2) Section 3806 (b) (1) and (b) (2) of the Internal Revenue Code (relating to credit against repayment on account of renegotiation) are respectively amended by inserting after "Chapter 2A," wherever appearing therein "Chapter 2B,".

(3) Section 3806 (b) of the Internal Revenue Code is further amended by renumbering paragraphs (2) and (3) as paragraphs (3) and (4), respectively, and by inserting after paragraph (1) the following new paragraph:

"(2) SPECIAL RULES AS TO INDIVIDUALS FOR 1942 AND 1943.—In the case of an individual subject to the provisions of sections 58, 59, and 60 of Chapter 1 and to the provisions of section 6 of the Current Tax Payment Act of 1943—

Made Retroactive to Oct. 21, 1942.

"(A) No credit shall be allowed under paragraph (1) of this subsection for any amount by which the tax for the taxable year 1942 under Chapter 1 is decreased by the application of paragraph (1) or paragraph (2) of subsection (a). If, contrary to the foregoing provisions of this subparagraph, any part of the amount shown on the return as such tax for the taxable year 1942 or any part of an amount assessed as such tax for such year or as an addition to such tax is credited against excessive profits eliminated for such year or against an amount disallowed for such year, the individual shall pay into the Treasury an amount equal to the amount of such credit, and if such amount is not voluntarily paid, the Commissioner shall, despite the provisions of the Current Tax Payment Act of 1943, collect the same under the usual methods employed to collect the tax imposed by Chapter 1. For the purposes of this section the amount required by this subparagraph to be paid into the Treasury shall be considered as an amount of excessive profits eliminated for the taxable year 1942, or an amount disallowed for such year, as the case may be; and despite the provisions of the Current Tax Payment Act of 1943, the payment of such amount shall not be considered as payment on account of the tax or estimated tax for the taxable year 1943.

Made Retroactive to Oct. 21, 1942.

"(B) In the case of a renegotiation with respect to the taxable year 1942 which is made after the enactment of the Current Tax Payment Act of 1943 and prior to the date on which the individual files his return

for the taxable year 1943 and with respect to which payment or repayment of the excessive profits eliminated or any part thereof is deferred by agreement, if the amount shown as the tax on the return for the taxable year 1943 reflects the application of paragraph (1) of subsection (a) with respect to the taxable year 1942 and is computed in accordance with the provisions of section 6 of the Current Tax Payment Act of 1943, there shall be credited against the excessive profits eliminated for the taxable year 1942 the amount by which the sum of the estimated tax previously paid for the taxable year 1943 and the payments on account of the taxable year 1942 which are treated as payments on account of the estimated tax for the taxable year 1943, exceeds the amount shown as the tax on the return for the taxable year 1943: *Provided,* That the amount allowable as a credit under the foregoing provisions of this subparagraph shall not exceed (i) the amount of credit of overpayment of tax provided for in the agreement deferring payment or repayment of excessive profits eliminated or (ii) the amount of excessive profits eliminated for the taxable year 1942 which, at the time the credit is allowed, have not been paid or repaid to the United States or an agency thereof or applied as an offset against other amounts due the individual. If any credit is allowed under this subparagraph, no other credit or refund under the internal revenue laws shall be made on account of the amount so allowed with respect to the taxable year 1943. Any credit of overpayment of tax allowed pursuant to the agreement deferring payment or repayment of excessive profits eliminated shall be considered as a credit allowed under this subparagraph.

Made Retroactive to Oct. 21, 1942.

"(C) Except as prevented by the provisions of the foregoing subparagraph (B), there shall be credited against the amount of excessive profits eliminated for the taxable year 1942 the amount by which the tax for the taxable year 1943 as computed under section 6 of the Current Tax Payment Act of 1943 is decreased

by reason of the application of paragraph (1) of subsection (a) with respect to the taxable year 1942; and there shall be credited against the amount disallowed for the taxable year 1942 the amount by which the tax for the taxable year 1943 as computed under section 6 of the Current Tax Payment Act of 1943 is decreased by reason of the application of paragraph (2) of subsection (a) with respect to the taxable year 1942.

For the purposes of the foregoing provisions of this paragraph, the terms 'taxable year 1942' and 'taxable year 1943' shall have the meanings assigned to them by section 6 (g) of the Current Tax Payment Act of 1943."

(4) The amendments made by paragraph (2) shall be effective as if they were a part of section 3806 of the Internal Revenue Code on the date of the enactment of the Revenue Act of 1942.

(d) EFFECTIVE DATE.—The amendments made by subsection (b) shall be effective only with respect to the fiscal years ending after June 30, 1943, except that (1) the amendments inserting subsections (a) (4) (C), (a) (4) (D), (i) (1) (C), (i) (l) (D), (i) (l) (F), (i) (3), and (l) in section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, shall be effective as if such amendments and subsections had been a part of section 403 of such Act on the date of its enactment, and (2) the amendments adding subsection (d) and (e) (2) to section 403 of such Act shall be effective from the date of the enactment of this Act.